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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT C. BICHAN,

Petitioner,

vs.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether a corporate officer has standing to bring an action against his employer and his employer's co-conspirators under Section 4 of the Clayton Act (15 U.S.C. §15), where his employment is terminated and he is blacklisted in retaliation for his initiation of competitive business practices and his refusal to participate in antitrust violations.

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OPINIONS IN THE COURT BELOW

The opinion was filed by the United States Court of Appeals for the Seventh Circuit on June 25, 1982 and is reported at 681 F.2d 514. The trial court memorandum opinion and order were entered on August 31, 1981, and are not reported.

The appellate opinion is contained in the Appendix at 1a-12a, and the trial court memorandum and order are in the Appendix at 13a-32a.

JURISDICTION

The judgment sought to be reviewed was entered June 25, 1982. The opinion noted that it was circulated to all judges of the court below pursuant to Circuit Rule 16 because it created a conflict between circuits, and none voted to hear the matter *en banc*. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

TITLE 15 U.S.C. § 1 (Sherman Act)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

TITLE 15 U.S.C. § 15 (Clayton Act)

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant re-

sides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Amended Complaint was filed in the District Court pursuant to 28 U.S.C. §1337. The facts in this case are derived from the Amended Complaint and an affidavit filed in the trial court.

Plaintiff Robert Bichan was hired in 1976 as president of defendant Chemetron Corporation's industrial gas division. Chemetron and the other defendants sold industrial gases in interstate commerce. During that period, defendants agreed among themselves to fix gas prices, to impose conditions of sale on their customers and to allocate customers. They also agreed not to compete for the historical customers traditionally tied to each defendant. Bids to other defendants' historical customers were always made at or slightly above the prevailing market price.

Plaintiff established marketing, market research and pricing departments at Chemetron. He also pursued competitive negotiations with customers of the other defendants. Plaintiff offered to sell gas to these historical customers of other defendants at reduced prices, contrary to the prevailing practice. His efforts resulted in the transfer of one of the defendant's historical accounts to Chemetron. He attempted to end Chemetron's participation in the price-fixing scheme.

As a consequence of those activities of plaintiff, Chemetron terminated his employment on July 6, 1976. He lost his salary, and also lost certain bonuses which were to be paid to him based upon the sales of Chemetron and the increased profits of his division. Defendants, to carry out and enforce their anticompetitive practices, refused to hire Mr. Bichan and blacklisted him.

Mr. Bichan filed suit under the Clayton Act (15 U.S.C. §15), alleging violation of the Sherman Act (15 U.S.C. §1). The District Court granted the motion of defendants to dismiss the Amended Complaint. That decision was affirmed by the Seventh Circuit Court of Appeals, and this petition ensued.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari in this case because the holding of the court below is in direct and irreconcilable conflict with the opinion of the United States Court of Appeals for the Ninth Circuit in *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1387 (9th Cir. 1982). The court in *Ostrofe* held that a sales manager, forced to resign because he refused to participate in antitrust violations, did have standing to bring an action under Section 4 of the Clayton Act (15 U.S.C. § 15). The United States Court of Appeals for the Seventh Circuit in the instant case held that a sales executive, terminated and black-listed for the same reasons, did not have such standing because he was not in the target area and had not suffered an antitrust injury.

The Seventh Circuit opinion noted the conflict on its cover page, reciting that "Pursuant to Circuit Rule 16, this opinion had been circulated among all judges of this court in regular active service because it creates a conflict between the Seventh and Ninth Circuits". That Court also noted (*Bichan v. Chemetron Corporation*, 681 F.2d 514, 518 (7th Cir. 1982)) that the sales manager in *Ostrofe* was in a situation very similar to that of Mr. Bichan. The conflict can be resolved only through decision of this Court. Rule 17.1(a) of this Court specifically provides for such resolution.

It may also be pertinent to note that a petition for a writ of certiorari is before this Court in the *Ostrofe* case, in *H.S. Crocker Company, Inc. v. Frank J. Ostrofe*, No. 82-174.

The conflict between the Ninth and Seventh Circuits is a substantive one arising from contrary philosophies. The Ninth Circuit gives primary consideration, utilizing its balancing test, to whether a grant of standing would further the enforcement purpose of Section 4 of the Clayton Act. *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1378, 1383 (9th Cir. 1982). It cited *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S. Ct. 198 (1968) for the proposition that the threat of private action is the bulwark of antitrust enforcement. Of particular merit was the reasoning that only an insider would have the knowledge necessary to expose the covert action. Discharge of law-abiding employees is essential to implementation of the anticompetitive scheme, and protection of that employee's rights under the Clayton Act thus becomes of equal importance to enforcement of the Sherman Act.

The Seventh Circuit has adopted a contrary position on the standing issue in that it does not focus on the purpose of the Clayton Act. Instead, that Court utilized

a more restrictive target area test, finding that Mr. Bichan was not the primary target of the anticompetitive agreement. That court held that the conspiracy was aimed at the gas market and not at employees, and concluded that Mr. Bichan was not the target and therefore did not suffer an antitrust injury. *Bichan v. Chemetron, supra* at 519-520. Whereas the Ninth Circuit found that a terminated employee was especially appropriate to be an antitrust plaintiff (*Ostrofe v. H. S. Crocker, supra* at 1385), the Seventh Circuit at 520 held that Mr. Bichan would not be an effective plaintiff.

The conflict thus presented to this Court for resolution is both specific, i.e., contrary results based on similar facts, and philosophical, i.e., the expansive "enforcement directed" theory of the Ninth Circuit versus the restrictive consumer theory of the Seventh Circuit. This type of conflict is not likely to be resolved by further Circuit Court analysis in future cases. The battle lines have been sharply drawn, and resolution of this conflict at this early stage is needed to give direction in a great number of anticipated cases. The division of Circuit authority has already led to conflicting trial court decisions in *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776, 780 (W.D. Pa. 1982) (court found standing in favor of discharged employee under Section 4) and *Callahan v. Scott Paper Co.*, 541 F. Supp. 550, 561 (E.D. Pa. 1982) (court utilized Third Circuit balancing test, but rejected Section 4 standing for discharged employee and rejected *Ostrofe*).

The issue raised in the two conflicting opinions will undoubtedly arise in the remaining Circuits. The general tort of retaliatory discharge has been the subject of an increasing number of lawsuits. Certain to be included in these suits are cases factually similar to the instant case. Such common law remedies are sometimes

allowed (*Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981)) and sometimes rejected (*Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378, 1384 (9th Cir. 1982) (fn. 12)). Only where the tort is recognized will the victim have a potential remedy. Absent the protection of Section 4, enforcement of the antitrust laws where only an employee has knowledge of the antitrust violation will be left to those states recognizing an action for retaliatory discharge. The result will be inconsistent enforcement of a federal statute. In addition, that remedy would generally leave co-conspirators unaffected because of the small likelihood of proving a cause of action against anyone other than the employing corporation.

The emergence of the tort of retaliatory discharge will inevitably lead to forum shopping, unless the Circuit conflict is resolved. This tactic should be discouraged because it would burden those courts recognizing standing. This problem has serious potential, because the presence of multiple defendants will increase one's ability to establish venue in a circuit which allows Section 4 standing.

The decision in *Bichan* also conflicts factually and philosophically with this Court's opinion in *Radovich v. National Football League*, 352 U.S. 445, 454, 77 S. Ct. 390, 395 (1957). This Court there held that the private antitrust litigant has been placed in a "most favorable position" and that the "Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws". The Court then reinstated the antitrust complaint which was based on the allegation that plaintiff was blacklisted from employment as a football player as a consequence of a conspiracy to monopolize interstate commerce. The similar allegations of the instant complaint are equally

well-stated and it should not have been dismissed. The Seventh Circuit rejected the relevance of *Radovich* as precedent (*Bichan v. Chemetron, supra* at 517), while the Ninth Circuit (*Ostrofe v. H.S. Crocker, supra* at 1382) adopted this petitioner's argument and found their case to be indistinguishable from *Radovich*.

Petitioner also suggests that the Seventh Circuit's restrictive application of Section 4 is at odds with the expansive interpretation of standing by this Court in *Blue Shield of Virginia v. McCready*, ... U.S. ....., 102 S. Ct. 2540 (1982). There, plaintiff alleged a Sherman Act violation in that defendants conspired to refuse to reimburse psychologists' treatment charges. The Court affirmed the existence of standing, noting at 2545:

> ". . . the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. (citations omitted). As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Mr. Bichan is similarly entitled to standing. His recovery would not be duplicative, because his damages are distinct from those of the ultimate product consumers. Denying a job to Mr. Bichan was one of the primary means alleged to have been used to achieve the illegal ends of the conspiracy, analogous to the denial of reimbursement in *Blue Shield*. The holding in *Blue Shield* at 2549 is equally applicable to the instant case:

> The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S., at 489, quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S., at 125.

Finally, the instant case satisfies the requirement of *Blue Shield* that the recovery be linked to the pro-competition policy of the antitrust act. Mr. Bichan's continued presence in the industry would in fact have provided the ultimate pro-competition impetus. The effect of Mr. Bichan's presence would not be limited to the placement of a non-conspirator in the industry. His continued employment in the industry would have meant a continuation of his competitive practices. The complaint established that he was in a position as an officer of the corporation to affirmatively promote competitive conduct and that he effectively did so. He protected competition, and he in turn deserves and is entitled to the protection of the Clayton Act. The decision of the Seventh Circuit stripping this vital protection from him should be reviewed by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 25, 1982.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81-2567

IN RE INDUSTRIAL GAS ANTITRUST LITIGATION

ROBERT C. BICHAN,

Plaintiff-Appellant,

v.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 3344—**Susan Getzendanner**, *Judge.*

ARGUED FEBRUARY 26, 1982—DECIDED JUNE 25, 1982*

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* Pursuant to Circuit Rule 16, this opinion has been circulated among all judges of this court in regular active service because it creates a conflict between the Seventh and Ninth Circuits. No judge voted to hear the matter *en banc*. Judge Sprecher died on May 15, 1982 without having expressed an opinion on the matter.

Before BAUER and POSNER, *Circuit Judges*, and BARTELS, *Senior District Judge*.**

BAUER, *Circuit Judge*. The issue on appeal is whether Robert C. Bichan, a salaried executive who was terminated from his position as president of Chemetron's Industrial Gas Division and blacklisted by the industrial gas industry, has standing to bring a private treble damage action against his employer under § 4 of the Clayton Act. 15 U.S.C. § 15. The district court held that Bichan could not maintain the action because he was not within the target area of the alleged anticompetitive conduct and had not suffered an "antitrust injury." We affirm.

Bichan was hired to manage Chemetron's Industrial Gas Division. Contrary to established marketing practices, Bichan began competing for customers of other producers and was successful in obtaining an account from a customer who traditionally purchased gas from another producer. In July 1976, shortly after obtaining this account, Bichan was dismissed and, since that time, has been unable to secure similar work in the industry.

Bichan alleges that a conspiracy existed to fix prices, to impose conditions of sales on customers and to allocate customers. He maintains that he was fired and blacklisted because he refused to adhere to these illegal practices. He argues that having lost salary and bonuses as a direct result of his refusal to participate in the conspiracy, he has suffered an "injury in his business or property" within the meaning of § 4 of the Clayton Act. 15 U.S.C. § 15.

Analysis of whether Bichan may maintain a treble damages action under § 4 is a two step process. First, we must determine whether Bichan's injury is an "antitrust injury" which is inextricably related to, and caused by, the alleged anticompetitive conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Weit v. Continental Illinois National Bank & Trust Co.*, 641

** The Honorable John R. Bartels, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

F.2d 457 (7th Cir. 1981). If we determine that Bichan has suffered an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), we must then decide if Bichan is the proper party to bring this suit. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977).

As the district court judge noted, the question of who may bring a private treble damages action under § 4 is characterized by doctrinal confusion. *In re Uranium Antitrust Litigation*, 473 F. Supp. 393, 401 (N.D. Ill. 1979). This confusion has been caused by the exceedingly broad terms in which the treble damages provision is framed. Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15. Courts have recognized, however, that the antitrust laws were not intended as a "panacea for all wrongs." *Parmalee Transportation Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961), *rehearing denied*, 368 U.S. 972 (1962), and that to read § 4's language literally would inevitably lead to excessively complex or numerous suits as well as damage awards unrelated to the social cost of the antitrust violation.[1] *See Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980). Thus, this language has been construed to imply restrictions limiting the injured parties who may seek redress under § 4 to those persons

[1] *See* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L.Rev. 467 (1980), where he argues that a plaintiff should not be permitted to recover for injury from an antitrust violation that does not foster inefficiency in the marketplace. Page contends that "the predominant goal of antitrust enforcement is the enhancement of competition rather than the subsidization of small and inefficient businesses," *id.* at 468, and believes that treble damages actions will promote economic efficiency, his term for consumer welfare, only if the size of the award approximates the social cost caused by the violation, discounted by the likelihood that the conduct will be discovered and penalized. *Id.* at 472.

whose injury is of a kind the antitrust laws are designed to prevent. *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1168 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

While courts have been in agreement that the right to bring treble damages actions should be limited, they have devised differing tests to identify which parties should be permitted to sue under § 4. To date, at least three tests have been adopted: (1) the target area test; (2) the direct injury test; and (3) the "zone-of-interest" test. All three tests attempt to identify those persons who have suffered an injury which flows from antitrust violations. The target area test focuses on the area affected by the anticompetitive conduct, requiring that the plaintiff be within the area of the economy which was endangered by a breakdown of competition and that plaintiff's injury be a direct result of the lessening of that competition. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 128 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturing Assoc.*, 414 U.S. 1045 (1973), *rehearing denied*, 414 U.S. 1148 (1974). The "zone-of-interest" test, although borrowing language from standing cases decided in the context of administrative law, appears to be similar to the target area test. This test requires that the plaintiff prove a direct and causal relationship between his business or property and the antitrust violations. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1145 (6th Cir. 1975). In contrast, the direct injury test, incorporating notions of privity, focuses on the relationship between the injured party and the antitrust violator. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 127 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturing Assoc.*, 414 U.S. 1045 (1973), *rehearing denied*, 414 U.S. 1148 (1974).[2]

However, not all persons who have suffered an injury flowing from the antitrust violation have standing to sue

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[2] *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturing Assoc.*, 414 U.S. 1045 (1973), *rehearing denied*, 414 U.S. 1148 (1974), analyzes each of these tests in detail.

under § 4. From the class of injured persons suffering an "antitrust injury" only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975). *Accord, In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturing Assoc.*, 414 U.S. 1045 (1973), *rehearing denied*, 414 U.S. 1148 (1974). *In re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979).

I

We first consider whether Bichan has sustained an "antitrust injury". We conclude he has not.

The parties agree that there is no Seventh Circuit precedent dealing specifically with Bichan's situation, but they differ as to the significance of this fact. Bichan argues that despite the lack of controlling precedent, the cause of his injury, the anticompetitive marketing scheme, is precisely the type of restraint of commerce proscribed by the Sherman Act, 15 U.S.C. § 1, and remediable by § 4 of the Clayton Act, 15 U.S.C. § 15. He argues that since the purpose of the antitrust laws is to provide compensation for injury as well as to preserve a competitive market structure, these laws should be interpreted not only to punish conspirators but also to protect persons who induce and encourage competition.

In contrast, appellees (collectively Chemetron), relying on *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), insist that Congress did not intend the antitrust laws to remedy all injuries which might conceivably be traced to anticompetitive conduct. Chemetron argues that the courts have restricted the treble damages remedy to injured parties who are within the target area of the anticompetitive conduct. Defendants assert that the effect of the conspiracy alleged here would be to raise the price of industrial gas, thereby depriving buyers of the lower prices and more advantageous conditions of sale which result from free competition. Thus, Chemetron contends that the only parties within the target area of the alleged conspiracy would be the purchasers of in-

dustrial gas and the non-conspiring gas producers. It concludes that Bichan is not within this target area and, thus, he has not suffered the requisite "antitrust injury."

The parties agree that this circuit has adopted the target area test and that if Bichan is to prevail, he must show that he has been a target of the alleged conspiracy. Bichan concedes that in the past, producers, wholesalers, retailers, or consumers have been the parties traditionally found to be targets of anticompetitive conduct. Nevertheless, he argues that § 4 protection should also be extended to executive employees who attempt to encourage competition for two reasons. First, he asserts that extending protection to those who encourage competition is consistent with the goals of the antitrust laws. Second, he contends that protecting those who encourage competition is the most effective method of eliminating antitrust violations.

In support of his contention that his termination and blacklisting is an "antitrust injury," Bichan relies on *Radovich v. National Football League*, 352 U.S. 445, *rehearing denied*, 353 U.S. 931 (1957); *Nichols v. Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967); and *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979). Bichan's reliance on these cases is misplaced.[3]

In *Radovich* and *Nichols* the alleged conspiracies were directed at restricting freedom of employment and inhibiting competition in the labor market. *Radovich* involved a boycott to prevent football players from transferring to teams in other leagues; *Nichols* involved an employee no-switching agreement in which publishers agreed not to employ each other's former employees until six months after the termination of the former employment. Since the conspiracies in both cases were intended to restrict competitive conditions in the labor market, the injuries complained of, restriction of employment alternatives, were directly related to the anticompetitive restraints. *See Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

[3] In its opinion the district court also rejected Bichan's reliance on these cases. We agree with the district court's analysis and, therefore, consider these cases only briefly here.

In contrast, Bichan does not stand in the same shoes as the plaintiffs in *Radovich* and *Nichols*. His injury did not result from a lack of competition in the labor market. The conspiracy Bichan charges was aimed at restraining competition in the industrial gas market, causing higher prices for consumers and potential loss of profits for nonconspiring producers. Since the area of the economy endangered by the anticompetitive scheme was not the labor market, Bichan can claim no "antitrust injury."

Further, we agree with the district court that *McNulty* does not support Bichan's claim because its decision is based on faulty reasoning. There the court applied the wrong standard to determine whether plaintiff's discharge for objecting to anticompetitive behavior was an "antitrust injury," incorrectly focusing on whether the injury was caused "by reason of" the anticompetitive behavior rather than, as *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977), requires, whether the injury resulted from a lessening of competition in the affected industry. We decline to adopt the *McNulty* rationale.[4]

Bichan acknowledges that *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), is the leading case in this circuit applying the target area test and concedes that under its rationale he cannot establish an "antitrust injury." He contends, however, that *Lupia* does not apply to his situation. In *Lupia* a supplier granted a five percent rebate to favored retail chain stores but did not offer the same rebate to independent retailers. Plaintiff, an exclusive distributor of the supplier, was forced to absorb

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[4] We also note that *McNulty* is distinguishable on its facts. There, the plaintiff received substantial bonuses based on the volume of sales in his territory. The anticompetitive practices reduced the volume of sales, adversely affecting the amount of these bonuses. Thus, the injury in *McNulty* was, in part, the result of a lessening of competition in the affected industry. In contrast, as the district court noted, Bichan has not alleged any loss of commissions due to decreased competition in the industrial gas market. *McNulty* does not advance Bichan's position.

the five percent rebate. He then brought a treble damages action against the supplier. The court reasoned that only the independent retailers were in the target area of the anticompetitive action and that the distributor's injury was not an "antitrust injury" but merely "one reflecting harsh treatment of a distributor by a manufacturer." *Id.* at 1169. It held that the distributor's injury was not an "antitrust injury" because if the supplier had absorbed the rebate, rather than passing it on to the distributor, the distributor would not have been injured, "[y]et the anticompetitive nature of [the] policy would not have been affected one iota." *Id.* Bichan claims that, unlike the distributor in *Lupia*, he was actively increasing competition by wooing customers of other producers, and that if he had not been terminated and blacklisted the anticompetitive conspiracy would not have continued.

Bichan's attempts to distinguish *Lupia* fail. First, we decline to speculate as to what effect Bichan would have had on the market had he not been terminated. More significantly, even assuming *arguendo* that Bichan would have, as he alleges, dramatically reduced anticompetitive activity, appellant's br. at 11, his ability to affirmatively promote competition is totally irrelevant to a determination of whether Bichan himself has sustained an "antitrust injury." The fact remains that the target area test requires that the injuries sustained flow from a lessening of competition in the marketplace. The injuries Bichan has suffered did not derive from the lessening of competition in the industrial gas industry.

We are aware of the recent Ninth Circuit case which holds that a sales manager in a situation very similar to that of Bichan's may bring a private treble damages suit. *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1378 (9th Cir. 1982). There, the majority read *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to interpret § 4 as excluding suits for damages where plaintiff's injury, termination and blacklisting, had nothing to do with the potential anticompetitive conduct, an unlawful merger. The majority noted that to allow suits for unrelated injuries would authorize damages for

losses that are of no concern to the antitrust laws and concluded that "*Brunswick* arguably would prevent suit [by an executive employee] if his injury resulted only from unilateral conduct [by the employer] in furtherance of the conspiracy rather than from the elimination of competition in the marketing of [the employee's] services or in the marketing of [the company's product]." *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1378, 1387 (9th Cir. 1982).

Having analyzed *Brunswick* as limiting § 4 to suits for damages directly caused by the anticompetitive effect of the antitrust violation, the *Crocker* majority then disregards that analysis. Ignoring *Brunswick*'s clear teachings, it substitutes its own ideas of what the policies underlying the antitrust laws should be and concludes that Congress intended that § 4 protect any injury falling "within the core of Congressional concern underlying the substantive provisions of the antitrust laws allegedly violated." 670 F.2d at 1378. Despite *Brunswick*'s holding to the contrary, the court held that plaintiff had suffered an "antitrust injury" because his asserted loss was of concern to the antitrust laws.

We reject the *Crocker* holding. We believe Judge Kennedy's dissent, maintaining that, under sound antitrust principles, a marketing director whose injury has nothing to do with the alleged anticompetitive conduct of price fixing has not sustained an "antitrust injury," is the more reasoned analysis, and we adopt it here.

We disagree with the majority analysis in *Crocker* for several reasons. First, we read *Brunswick* to hold that § 4 protects only those persons injured as consumers or competitors in a defined market or in a discrete area of the economy. Second, reading *Brunswick* in conjunction with *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), we are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge. Thus, a mere relationship with the anticompetitive scheme is insufficient to bring the injured party within the scope of § 4; only where the injury is directly related to the scheme's anticompetitive effect does § 4 apply.

We decline to usurp the legislative role and rewrite the treble damages provision to extend antitrust protection beyond that dictated by established precedent and Congressional intent. Applying the established rules of this circuit, we conclude that Bichan has sustained no "antitrust injury" because, while he may have suffered some injury-in-fact he was not the target of the alleged anticompetitive practices and his injury, therefore, did not result from the defendants' acquisition or exploitation of market power.

II

However, the presence of an antitrust injury is not the sole determinant of whether Bichan may maintain a treble damages suit. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), citing *Hawaii v. Standard Oil Corp.*, 405 U.S. 251 (1972). *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977). Thus, even assuming *arguendo* that we were persuaded to adopt the *Crocker* holding that injury to an employee resulting from a conspirator's effort to implement the anticompetitive practices constitutes an "antitrust injury," we still do not believe Bichan is the proper party to bring a treble damages action because his injury is simply too remote from the alleged illegal conduct.

Unless § 4's phrase "by reason of" is interpreted to require a direct causal link between the antitrust violation and the resulting injury, the courts would be flooded with antitrust litigation. If § 4 were construed "to permit treble damages suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Thus, as a general rule, stockholders, employees

and creditors of an injured company and suppliers of an injured customer have all been denied recovery because their injuries were too "indirect," "secondary," or "remote." *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975) (citations omitted).

While the legislative history to § 4 indicates that the treble damages remedy was intended primarily as a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), designed to protect consumers who are overcharged as the result of price-fixing, the statutory language does not restrict the treble damages remedy solely to consumers. *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). We do believe, however, that the phrase "by reason of" implies a standing requirement, limiting the statute's applicability to those plaintiffs who are efficient enforcers of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). For this reason, a determination of antitrust standing should focus not only on whether there has been an "antitrust injury," but also on whether the particular plaintiff is the appropriate antitrust enforcer. Thus, the conflicting interests of deterrence through private antitrust enforcement and redress for injury must be balanced against the avoidance of excessive treble damages litigation. An appropriate balance is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust conduct. It is this select class of plaintiffs that can impose the deterrent sting of treble damages at the smallest cost of enforcement. Since Bichan is neither a consumer nor a competitor of Chemetron, his injury was indirectly caused by defendants' alleged price-fixing conspiracy and he does not have antitrust standing to maintain this suit.

While Bichan may seek to vindicate his interests in the state courts, he may not maintain a § 4 treble damages action in federal court. We agree with the dis-

trict court that Bichan has failed to establish that he has sustained an "antitrust injury" or that he has antitrust standing. Accordingly, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT C. BICHAN, Plaintiff,	)	
v.	)	No. 80 C 3349
CHEMETRON CORPORATION, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

Plaintiff Robert Bichan has filed a complaint against his former employer, defendant Chemetron Corporation, and four other leading producers of industrial gas. Count I of the amended complaint alleges a violation of section 1 of the Sherman Act and Count II alleges pendent state claims. Defendants have filed a motion to dismiss for failure to state a claim, asserting that plaintiff lacks standing to pursue his antitrust claim and

that his pendent claims should be dismissed for lack of a viable federal claim.

The gist of Bichan's antitrust claim is that defendants unlawfully terminated his employment and then blacklisted him because he uncovered and objected to defendants' anti-competitive scheme. According to his complaint, Bichan was hired as President of Chemetron's Industrial Gas Division in February, 1976. Shortly afterwards, he became aware that Chemetron and the other defendants had conspired to fix prices and allocate customers in the industrial gas industry. Bichan objected to these policies and managed to win for Chemetron an account that was the "historical customer" of another gas producer. In July, 1976, Chemetron summarily dismissed Bichan and he has since then been unable to obtain a management position. Bichan contends that his dismissal and blacklisting were in furtherance of defendants' conspiracy because they prevented further interference

with the anticompetive scheme.

For purposes of a motion to dismiss, these allegations are taken as true. Moreover, the complaint will not be dismissed unless it is evident that plaintiff is not entitled to any relief. Conley v. Gibson, 355 U.S. 41 (1957).

Defendants argue that Bichan lacks standing under the antitrust laws because he is not within the target area of the alleged anticompetitive conduct and because he has not suffered the requisite "antitrust injury."

Analysis

The concept of standing in antitrust cases*/ has caused much confusion in the

*/ "Antitrust standing" is distinguishable from the concept of constitutional standing, which requires "injury in fact." Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 811 (1977). It is also distinguishable from the concept of "antitrust injury" set forth in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

federal courts. E.g., In re Uranium Antitrust Litigation, 473 F.Supp. 393, 401 (N.D. Ill. 1979) (law of antitrust standing characterized by doctrinal confusion). Much of the confusion springs from the failure to distinguish between antitrust standing and the scope of protection under the antitrust laws. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 728 n.7 (1977). The two are not coextensive.

> "The scope of antitrust protection extends to those persons who are either directly or indirectly injured by antitrust violations and whose injury is 'of the kind the antitrust laws were written to guard against.' [i.e., an antitrust injury]. The standing doctrine narrows this class of injured persons to a subclass of plaintiffs who are best situated, because of their market position, to serve the twin goals of providing compensation for injuries and preserving a competitive market structure."

Uranium Antitrust Litigation, id. (citations omitted). The scope of antitrust protection is defined by the phrase "by reason of" in

section 4 of the Clayton Act*/, which has been interpreted to mandate not only causation in fact but also legal causation. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977).

The Seventh Circuit has repeatedly drawn attention to this distinction between antitrust standing and the scope of antitrust protection or the requirement of "antitrust injury." In Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167-69 (7th Cir. (1978), cert. denied, 440 U.S. 982 (1979), the Seventh Circuit found it unnecessary to choose between the doctrines of standing and antitrust injury because the plaintiff there could not prevail under either. The

---

*/ Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained."

plaintiff in Lupia was a distributor. He alleged that the defendant supplier granted a discount to favored retail chain stores and then charged the cost of that discount back to the distributor-plaintiff. The supplier did not offer this discount to independent retailers, thus allegedly violating the prohibition against price discrimination.

In concluding that the plaintiff could not prevail, the Seventh Circuit stated first that the independent retailers were the "targets" of the defendant's anticompetitive conduct and that the distributor could not sue as their surrogate. The Court then stated that the plaintiff did not satisfy the test for "antitrust injury." The Court reasoned:

> "The defendant's anticompetitive action, the 5 percent rebate to chain stores, would have been equally anticompetitive if plaintiff had not been required to absorb it. That he was so required

> is, therefore, not an 'antitrust injury' but one reflecting harsh treatment of a distributor by a manufacturer. If defendant had absorbed the rebate, there would have been no injury, yet the anticompetitive nature of its policy would not have been affected one iota. So it is not an 'antitrust injury.'"

586 F.2d at 1169. Under this reasoning, a court must examine an antitrust claim to determine whether the injury claimed flows from the anticompetitive conduct charged, or whether the anticompetitive conduct exists independent of any injury to the plaintiff.

Lack of Antitrust Injury

Here, the anticompetitive conduct was the price-fixing and allocation of customers in the industrial gas industry. Plaintiff's injury was his loss of employment. But plaintiff's loss of employment did not result from the lessening of competition in the industrial gas industry.

By analogy with the Seventh Circuit's reasoning in Lupia, the defendants' alleged behavior in this case would be equally anti-competitive even if Bichan had not been dismissed. If Chemetron had not dismissed Bichan, he would have suffered no injury, "yet the anticompetitive nature of [the conspiracy] would not have been affected one iota." That he was dismissed reflects harsh treatment of an employee by his employer, but it is not an antitrust injury. Cf. Broyer v. B. F. Goodrich Co., 415 F. Supp. 193, 197 (E.D.Pa. 1976) (private plaintiff not entitled to relief merely because antitrust violation occurred).

In Broyer, the court considered two theories by which a discharged employee may bring an antitrust action against a former employer, rejecting one theory and accepting the other. Under the rejected theory, the employee argued that his employer discharged

him to discredit his testimony as a witness against the employer in a pending price fixing case. The court concluded that the employee's injury -- the termination of his employment -- did not result from the alleged antitrust violation.

Under the meritorious theory, the employee, a sales representative, contended that he was injured by the loss of commissions as a consequence of the price-fixing scheme. The court held that such a loss of income flowed from lessened competition in the marketplace and thus constituted the "requisite injury" to allow the employee to sue under the antitrust laws. 415 F.Supp. at 198.

In the present case, Bichan alleges defendants dismissed and blacklisted him to prevent him from interfering with their anticompetitive scheme. This allegation is akin to the rejected theory in Broyer. Bichan, however, has not alleged any loss of commis-

sions due to decreased competition in the industrial gas market, in order to bring his claim under the successful theory in Broyer.

Bichan has alleged that Chemetron paid him "bonuses based in substantial part upon the sales of Chemetron" (Amended Complaint, Count I, ¶16), but this is too attenuated to support the necessary antitrust injury. The bonus is not based on sales made by Bichan himself, but on the overall profitability of his division. Any reduction in sales hurts Chemetron before it hurts Bichan. The "extra step" distinguishes Bichan's case from that of the sales representative in Broyer. Cf. Pitchford v. Pepi, Inc., 531 F.2d 92, 97 (3rd Cir. 1976), cert. denied, 440 U.S. 981 (1979) (allegation that salary was diminished as a result of antitrust injury to corporation does not establish standing).

Bichan has failed to establish that his

loss of employment resulted from decreased competition. Thus his injury is not an "antitrust injury" and he does not come within the scope of protection offered by the antitrust laws.

Outside the Target Area

Under the Seventh Circuit's teaching in Havoco and Lupia, even if Bichan suffered an "antitrust injury," he lacks standing because he was not a "target" of the anti-competitive conduct. The "targets" of the price-fixing and customer allocating conspiracy described by Bichan are clearly the purchasers of industrial gas and non-conspiring competitors in the industry. Moreover, because of their market position, the purchasers and non-conspiring competitors are best situated to serve the twin goals of providing compensation for injuries and preserving a competitive market structure. See In re Uranium Antitrust Litigation, 473

F.Supp. 393, 401 (N.D. Ill. 1979).

Plaintiff's Arguments

Plaintiff, in opposing the motion to dismiss, correctly argues that his loss of employment is an injury to his "business or property" within the meaning of the statute. See Nichols v. Spencer International Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967). But this is not the same as being injured "by reason of" a violation of the antitrust laws.

Plaintiff cites a number of cases in which terminated or blacklisted employees have sued their former employers under the antitrust statutes. From this, plaintiff apparently would have the court conclude that former employees, as a class, are protected by the antitrust laws. The determination whether a particular plaintiff may bring an antitrust action, however, is made on a case by case basis. See, e.g., Cromar Co. v.

Nuclear Materials & Equipment Corp., 543 F.2d 501, 506 (3rd Cir. 1976) (each case to be analyzed "in terms of the particular factual matrix presented").

Cases cited by plaintiff such as Radovich v. National Football League, 325 U.S. 445 (1957); Quinonez v. National Association of Securities Dealers, Inc., 540 F.2d 824 (5th Cir. 1976); and Nichols v. Spencer Intertional Press, Inc., 371 F.2d 332 (7th Cir. 1967), are distinguishable from the present case because, in those cases, the purpose of the antitrust conspiracy was to prevent the free interchange of employees in the relevant industry, while the conspiracy in this case, as described by Bichan, sought to restrain competition in the industrial gas market. The employment market was not the target of the alleged anticompetitive conduct, as it was in the cited cases. The blacklisting of Bichan was not the result of

a boycott aimed at employees. See Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176 (5th Cir. 1976).

In the second group of cases relied upon by Bichan, the employee-plaintiffs all had a direct stake in the competitive market. In Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90 (3rd Cir.), cert. denied, 434 U.S. 823 (1977), plaintiff, a sales representative, alleged that his sales, and therefore his commissions, were reduced by the defendant's exclusive dealing and territorial limitations. Similarly, in Roseland v. Phister Manufacturing Co., 125 F.2d 417 (7th Cir. 1942), plaintiff, a sales agent, argued that defendant's scheme of allocating customers and price-fixing deprived him of sales. These and similar cases are also distinguishable from the present case because Bichan has not alleged that he received any commissions from sales. The

alleged price-fixing and customer-allocating conspiracy, therefore, did not injure Bichan by reducing his sales income. See the discussion of Broyer v. B. F. Goodrich Co., 415 F.Supp. 193 (E.D.Pa. 1976), supra, at pp. 5-7.

Bichan also relies on McNulty v. Borden, Inc., 474 F.Supp. 1111 (E.D.Pa. 1979), in which the plaintiff alleged that the defendant offered special pricing arrangements that discriminated between different purchasers and that the defendant discharged him from his supervisory position because he objected to such antitrust violations, all in violation of section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13. This court, however, is not persuaded by the reasoning in McNulty.

The McNulty court began its analysis by determining that the loss of employment constitutes an injury to business or property.

That is concededly the rule in this circuit. The McNulty court then considered whether the plaintiff's allegations made out a "direct injury" or showed that the plaintiff was within the "target area" of the violation. In concluding that there was a "direct injury," the court used a "causation in fact" standard, rather than a legal causation test. Because the plaintiff was discharged for objecting to anticompetitive behavior, the court reasoned that the plaintiff was injured "by reason of" the anticompetitive behavior. This reasoning is incorrect; the antitrust plaintiff must show that his injury results from a lessening of competition in the affected industry. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977).

The McNulty court also considered whether Congress intended to grant standing to one in the plaintiff's position. Although con-

ceding that nothing in the legislative history is dispositive, the court determined that "it would be difficult" to conclude that Congress intended to exclude one situated as the plaintiff was, because of the broad remedial purpose of the antitrust laws. 474 F.Supp. at 1117-18. This ignores the oft-repeated caution that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14 (1972). See also Broyer v. B. F. Goodrich Co., 415 F.Supp. 193, 197 (E.D.Pa. 1976).

Finally, the statute involved in McNulty was section 2, which provides a cause of action only for purchasers or competitors. The McNulty court did not consider this statutory limitation in its published opinion; however, when the case went to trial,

the trial judge granted a motion for a directed verdict on the grounds that the plaintiff "was a Unit Sales Manager. He was not a customer or a competitor." Trial Transcript, Vol. VII at 7.3 (January 27, 1981). Thus, the McNulty case is distinguishable because it involved a different statute, and the opinion itself is undermined by the Court's later ruling.*/

Policy consideration reinforce this court's conclusion that Bichan may not proceed with his antitrust action. The treble damage remedy is a potentially "lethal cannon" and it poses the threat of ruinous recoveries.

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*/ Although the trial judge in McNulty indictated that there may be a difference between the issue of standing based on an evaluation of the complaint and the same issue presented after the plaintiff has put on all of his evidence, the failure to consider whether the plaintiff had alleged facts in his complaint that would show he was a competitor or customer casts suspicion on the court's analysis.

Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1168 (7th Cir. 1978); In re Multi-district Vehicle Air Pollution, 481 F.2d 122, 130 (9th Cir. 1973). Here, the public interest in free competition is adequately protected by In re Industrial Gas Antitrust Litigation, Master File No. 80 C 3479, also pending in this court. Then, too, Bichan's alleged injury is not without remedy; his amended complaint alleges state causes of action. In light of these circumstances, the court sees no compelling equitable reasons for stretching the jurisdictional prerequisites of standing or "antitrust injury" to accommodate plaintiff.

Accordingly, the court concludes that plaintiff has not satisfied the test set out in Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), in that he has not alleged facts establishing the requisite "antitrust injury" or standing. As plain-

tiff may not pursue his federal claim, his pendent state claims must also be dismissed. Therefore, defendants' motion to dismiss is granted.

/s/ Susan Getzendanner
Susan Getzendanner
United States District Judge

Dated: August 31, 1981

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No. 82-493

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT C. BICHAN, *Petitioner*,

v.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a former salaried corporate employee may maintain an action for treble damages under Section 4 of the Clayton Act by claiming that he was discharged and blacklisted by reason of his refusal to take actions in furtherance of an alleged price-fixing and customer-allocation conspiracy among his corporate employer and certain of its competitors.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-493

ROBERT C. BICHAN,

Petitioner,

v.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

Respondents urge that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered 25 June 1982 be denied for the reasons set forth below.[1]

[1] In compliance with this Court's Rule 28.1, corporate respondents submit the following information concerning their parents, subsidiaries (except wholly owned) or affiliates that are publicly owned (in whole or part) corporations:

ARGUMENT

ALTHOUGH THE NINTH AND SEVENTH CIRCUITS HAVE DISAGREED AS TO THE ANTITRUST STANDING OF SIMILARLY SITUATED PLAINTIFFS, THAT DIVERGENT RESULT IS LIMITED IN SCOPE AND POTENTIAL IMPACT AND DOES NOT REQUIRE RESOLUTION BY THIS COURT

The only ground seriously advanced by petitioner as to why certiorari should be granted in this case is that the holding below is in "direct and irreconcilable conflict," Petitioner's Brief at 4, with the opinion of the United States Court of Appeals for the Ninth Circuit in *Ostrofe* v.

Air Products & Chemicals, Inc., has no parent and owns an interest in Sociedad Espanola de Carburos Metalicos SA, a Spanish Corporation.

Airco, Inc., is owned directly by The BOC Group plc, a British company, and owns no partial interest in any public corporation.

Liquid Air Corporation (formerly Liquid Air Corporation of North America) is indirectly owned in part by L'Air Liquide, a French corporation, and Allegheny International, Inc., and owns an interest in Oxitenio do Brasil S.A. Liquid Air, Inc., has been renamed LAI Properties and is entirely owned by Liquid Air Corporation.

Chemetron Corporation is entirely owned by Allegheny Ludlum Industires, Inc. One or the other of these corporations owns an interest in Kaimona, Inc.; Trans Global Films, Inc.; Sciaky Bros. Inc.; Liquid Air Corporation; Midwest Carbide Corporation; Orgotherm, Inc.; New Bra-Con Industries, Inc.; Rob-Con Ltd.; Titanium Metals Corporation of America; Scripto, Inc.; Anja Engineering Corporation; Aljac Corporation; Longlite Pen Co.; Broadway Pen Corporation; Burnham Products Corp.; M.A. Ferst Ltd.; and Scripto Export, Inc.

Union Carbide Corporation has no parent and owns an interest in Union Carbide Mexicana S.A. de CV; F.A. White Martins; Union Carbide Canada, Ltd.; Union Carbide India, Ltd.; and Union Carbide Australia and New Zealand, Ltd.

H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3075 (U.S., Aug. 2, 1982)(No. 82-174). While the Seventh and Ninth Circuits have reached different results on similar facts, the divergence of opinion involves only the standing of a very narrow class of antitrust plaintiffs and cannot be generalized in terms of "the expansive 'enforcement directed' theory of the Ninth Circuit versus the restrictive consumer theory of the Seventh Circuit." Petitioner's Brief at 6.

Confronted with a square conflict between two Courts of Appeals over the antitrust standing of an equally restricted group of possible claimants, this Court has previously declined to grant certiorari. In *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), the Court of Appeals held that a film producer had antitrust standing to challenge a distributor's block booking and expressly disagreed, 433 F.2d at 1076 n.4, with the contrary conclusion reached earlier that same year by the Second Circuit, *per curiam*, in *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (1970), *cert. denied*, 401 U.S. 949 (1971). It is noteworthy that this Court has never subsequently found it necessary to resolve that conflict, and the same considerations which led to the denial of certiorari in both *Mulvey* and *Fields Productions, Inc.*, are equally applicable here.

Recognizing that the mere fact of a conflict among circuits is not, under Supreme Court Rule 17.1, a controlling factor in the grant of certiorari, petitioner attempts to add color and substance to the divergence of result by characterizing it as follows:

> "This type of conflict is not likely to be resolved by further Circuit Court analysis in future cases. The

> battle lines have been sharply drawn, and resolution of this conflict at this early stage is needed to give direction in a great number of anticipated cases." Petitioner's Brief at 6.

These comments do not withstand analysis.

Any newly arisen conflict over the narrow issue of antitrust standing for a discharged employee is one which may well be resolved by future litigation. Prior to the Ninth Circuit's decision in *Ostrofe*, no case had ever granted antitrust standing to a discharged employee in the circumstances of petitioner here.[2] And as is apparent from the face of the majority opinion and emphasized in Judge Kennedy's vigorous dissent, *Ostrofe* does not build logically on any previous line of cases and in fact constitutes a sharp departure from established Ninth Circuit precedent. Lacking roots and subjected to cogent criticism at its inception, *Ostrofe* may well come to be recognized as aberrational by a Ninth Circuit more willing to join the mainstream of developing antitrust standing law.

The Ninth Circuit may be especially reluctant to perpetuate *Ostrofe* should other circuits join the Seventh in denying antitrust standing to similarly situated discharged employees. A step toward this self-corrective process may already be underway in the Third Circuit where, as noted by petitioner, one district court has relied upon and another has rejected *Ostrofe* as authority for granting antitrust standing to a discharged employee.

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[2] Petitioner's contention that the decision below "conflicts factually and philosophically" with this Court's opinion in Radovich v. National Football League, 352 U.S. 445, 454 (1957), Petitioner's Brief at 7, is incorrect because *Radovich* involved, as this case does not, a conspiracy with the central purpose of preventing the free interchange of employees.

Petitioner's Brief at 6. A decision on the standing issue by the Third Circuit would be especially persuasive given that Court's espousal of a balancing test for standing "comprised of many constant and variable factors" which requires analysis of the "factual matrix presented by each case." *Bravman* v. *Basset Furniture Industries, Inc.*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). To the extent that *Ostrofe* is similarly premised on "a balancing of competing policy interests," 670 F.2d at 1383, a contrary result out of the Third Circuit may well incline the Ninth Circuit to reconsider in a future case involving the antitrust standing of a discharged employee the weight to be afforded various policy objectives. Should, on the other hand, the Third Circuit agree with the Ninth, that fact might suggest an irreconcilable conflict between the balancing and target area approaches to standing which would merit resolution by this Court. But as things now stand, the battle lines over the issue of antitrust standing for the terminated employee are not sharply drawn except as between two of twelve circuits. Any decision by this Court concerning the propriety of review should properly await further litigation that, even if not leading to total harmony, might produce a satisfactory majority view among the lower courts.

Petitioner's *in terrorem* argument about the need for present review by this Court to "give direction in a great number of anticipated cases," Petitioner's Brief at 6, is flatly controverted by *Ostrofe* itself. There the Court granted standing in part because it believed that:

> "Employees discharged by their employer for declining to take part in an antitrust violation are not so numerous that recognizing their claims would threaten a flood of litigation . . . ." 670 F.2d at 1385 (footnote omitted).

Petitioner's further suggestion that the Seventh Circuit's disposition of this case is "at odds" with *Blue Shield of Virginia* v. *McCready*, 457 U.S. ____, 102 S.C. 2540 (1982), Petitioner's Brief at 8-9, if meritorious, would not support but rather would cut against the grant of certiorari in this case. If, as petitioner asserts, this Court's recent determination affirming the antitrust standing of a consumer somehow bears strongly on the standing of a discharged employee, then the inferior courts should be expected to recognize that fact in deciding future cases, thereby eliminating any conflict and obviating the need for review here.

Finally, should this Court deny the pending petition for certiorari in the anterior *Ostrofe* case, it would follow that the petition here should also be denied. And conversely, should this Court grant the *Ostrofe* petition it would not be necessary to accept review of this case to resolve the conflict to which petitioner points.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for certiorari should be denied.

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Respectfully submitted,

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